

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF ILLINOIS

In Re)	
)	In Bankruptcy
DONALD WEINHOEFT and)	
ANITA L. WEINHOEFT)	Case No. 97-70416
)	
Debtors.)	
)	
)	
DONALD WEINHOEFT and)	
ANITA L. WEINHOEFT,)	
)	
Plaintiffs,)	
)	
v.)	Adversary No. 00-7072
)	
UNION PLANTERS BANK, N.A.,)	
UNION PLANTERS PMAC, INC.,)	
corporation, individually)	
and collectively, and as)	
successors in interest to)	
MAGNA BANK, N.A., MAGNA)	
GROUP, INC., MAGNA BANK OF)	
CENTRAL ILLINOIS, corp-)	
orations,)	
)	
Defendants.)	

OPINION

This matter is before the Court on the Motion of Defendant Union Planters Bank, N.A., to Dismiss and Strike Complaint and Debtors' Response thereto.

On February 7, 1997, Debtors filed their voluntary Chapter 7 bankruptcy petition. Magna Bank, N.A., a predecessor in interest of Defendant, Union Planters Bank, N.A. (individually and collectively "the Bank"), was listed as a creditor on Schedule A of Debtors' bankruptcy schedules. On the date of filing, Debtors owed

the Bank an approximate principal balance of \$81,000 on a note which was secured by a first mortgage on Debtors' residence. On the petition date, Debtors also filed a Debtors' Statement of Intention wherein they declared their intention to surrender the residence. Debtors vacated the premises and, on June 23, 1997, Debtors' discharge was issued.

On March 29, 2000, Debtors filed their two-count adversary complaint seeking actual and punitive arising as a result of the Bank's alleged civil contempt. Count I of the Complaint alleges that the Bank willfully and repeatedly violated the automatic stay provisions of 11 U.S.C. § 362, resulting in emotional stress and embarrassment, along with damage to Debtors' credit rating. Count II of the Complaint alleges that the Bank willfully and repeatedly violated the permanent injunction provisions of 11 U.S.C. § 524(a), resulting in severe mental and emotional distress, embarrassment, and other damages.

Debtors allege a number of facts which they argue constitute violations of 11 U.S.C. § 362 and § 524(a). Among the specific allegations, Debtors contend that the Bank (i) continuously reported Debtors as delinquent on their mortgage payments to credit reporting agencies, (ii) allowed the publication of notices of delinquent taxes in the local newspaper citing Debtors as owners of the residence, (iii) contacted Debtors regarding property insurance and making future mortgage payments, (iv) attempted to collect a portion of its debt under a proposed "Agreement for Deed", and (v) filed a foreclosure complaint naming Debtors as

defendants.

On April 28, 2000, the Bank filed its Motion to Dismiss and Strike Complaint wherein the Bank argues that the Complaint fails to state a claim upon which relief can be granted. The Bank contends none of the acts or omissions alleged by the Debtors constitutes a violation of the automatic stay or permanent injunction provisions of the Bankruptcy Code.

In order for a defendant to prevail on a motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) and its bankruptcy counterpart Rule 7012, it must clearly appear from the pleadings that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Colfax Corp. v. Illinois State Toll Highway Authority, 79 F.3d 631, 632 (7th Cir. 1996) (citation omitted); Meriwether v. Faulkner, 821 F.2d 408, 411 (7th Cir. 1987), *cert. denied*, 484 U.S. 935 (1987). The court must take as true all well-pleaded material facts in the complaint, and must view these facts and all reasonable inferences which may be drawn from them in a light most favorable to the plaintiff. See Northern Trust Co. v. Peters, 69 F.3d 123, 129 (7th Cir. 1995); Infinity Broadcasting Corp. of Illinois v. Prudential Ins. Co. of America, 869 F.2d 1073, 1075 (7th Cir. 1989); Corcoran v. Chicago Park Dist., 875 F.2d 609, 611 (7th Cir. 1989); Marmon Group, Inc. v. Rexnord, Inc., 822 F.2d 31, 34 (7th Cir. 1987). The issue is not whether the plaintiff will ultimately prevail, but whether he has pleaded a cause of action sufficient to entitle him to offer evidence in support of his

claims. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. Demitropoulos v. Bank One Milwaukee, N.A., 915 F.Supp. 1399, 1406 (N.D. Ill. 1996) citing Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990).

The automatic stay provisions of Section 362 of the Bankruptcy Code prohibit any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case. 11 U.S.C. § 362(a)(6). The permanent injunction provisions of 11 U.S.C. § 524(a)(2) enjoin the commencement or continuation of actions to collect a debt as a personal liability of the debtor after the discharge has been issued.

Debtors' Complaint alleges sufficient facts which, if proven true, could afford Debtors a basis for relief under Sections 362 and 524 of the Bankruptcy Code. For example, in their Complaint Debtors allege that, from June, 1997, until December, 1998, the Bank reported Debtors 120 days delinquent for mortgage payments which Debtors were not, because of their bankruptcy filing and discharge, obligated to make. In its Motion to Dismiss, the Bank argues that such reports were truthful and that, because there was no intent on the Bank's part to use the reports to collect from the Debtors, there was no violation of the automatic stay. The issue of whether the reports were truthful is disputed by Debtors.

Even if it is shown that the Bank's reports to the credit-reporting agencies contain truthful information, such a report, if

made with the intent to harass or coerce a debtor into paying a pre-petition debt, could be deemed a violation of the automatic stay. In re Singley, 233 B.R. 170, 173 (Bankr. S.D. Ga. 1999) (citations omitted). On this point alone, Debtors have clearly pleaded facts which, if proven true, would entitle Debtors to relief.

The same is true of the other factual allegations raised by Debtors in their Complaint. For example, on April 24, 1998, the Bank allegedly notified the Debtors that their property insurance had lapsed. As another example, in May, 1998, the Bank allegedly sent a mortgage loan coupon book to Debtors, followed shortly thereafter by a follow-up letter. The Bank does not dispute these allegations, nor does it dispute that it had actual knowledge of the Debtors' bankruptcy filing and of their abandonment of the subject property in early 1997. At the very least, these are *de minimus* or mere technical violations of the permanent injunction. If it can be shown they were done with an intent to coerce or harass Debtors into paying some or all of their debt to the Bank, actual and/or punitive damages may well be warranted.

Finally, the Complaint alleges facts which, if proven true, would tend to suggest a pattern of conduct on the part of the Bank. When taken as a whole, even *de minimus* or mere technical violations may provide a solid factual basis for a finding against the Bank and an award of actual and/or punitive damages. For these reasons, the Bank's Motion to Dismiss is denied.

This Opinion is to serve as Findings of Fact and Conclusions

of Law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure.

See written Order.

ENTERED: August 1, 2000

LARRY LESSEN
UNITED STATES BANKRUPTCY JUDGE

c: Stephen T. Fieweger
P.O. Box 3250
Rock Island, IL 61204-3250

David O. Edwards
P.O. Box 2117
Springfield, IL 62705

U.S. Trustee
401 Main St. #1100
Peoria, IL 61602

CERTIFICATION OF MAILING

The undersigned, deputy clerk of the United States Bankruptcy Court, hereby certifies that a copy of this Opinion was mailed this date to the parties listed herein.

Dated: August 1, 2000

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CENTRAL ILLINOIS, corp-)	
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ORDER

For the reasons set forth in an Opinion entered this day,
the Motion to Dismiss and Strike Complaint filed by Union Planters
Bank on April 28, 2000, be and is hereby denied.

ENTERED: August 1, 2000

LARRY LESSEN
UNITED STATES BANKRUPTCY JUDGE

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